My Lords, If I had to answer the first of the certified questions, I would answer it in the negative, but, strictly speaking, that question is irrelevant, according to the view which I have taken, to the first issue which your Lordships have to decide. Indeed, according to my view, even a more widely drawn question, raising the issue whether the patient was unlawfully at large, would be unnecessary to the final determination which I am proposing.

As to the second question, the reference to "hot pursuit" introduces an element of confusion. What s. 17(1)(d) of PACE requires is pursuit by the constable in addition to an intention to arrest followed by resort to the premises where he reasonably believes that the person he is seeking can be found.

Therefore, my Lords, without answering the certified questions, I would for the reasons I have given remit the case stated to the Crown Court with a direction

(1) to revoke the orders that the appellant be conditionally discharged and that she pay compensation and
(2) to dismiss the charges brought against her.

Lord Browne-Wilkinson

My Lords,

I have read the speech of my noble and learned friend Lord Lowry and, for the reasons which he gives, would remit the case stated to the Crown Court with the directions which he proposes.

NEAT HOLDINGS PTY. LIMITED

v.

KARAJAN HOLDINGS PTY. LIMITED & ORS.

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, TOOHEY & GAUDRON JJ.
[F.C. 92/053]
16 DECEMBER 1992

EVIDENCE: Standard of proof - Balance of probabilities

CONTRACT: Misrepresentation.

TORT: Deceit - Negligent misstatement.

CRIMINAL LAW: Forgery - Fraud - Section 52 Trade Practices Act 1974 - s. 10 Fair Trading Act 1987.

The respondents sold a business to the appellants. The respondents' directors made representations to the appellants director which included a business profile showing an average weekly turnover of $5,793. After the take-over the weekly takings amounted to $3,000 only. The appellants later rescinded the contract in writing on the ground of misrepresentation. The trial Judge gave his decision in favour of the appellants. On appeal this decision was set aside. The respondents' appeal was on the ground that the trial Judge did not direct himself and disregarded the degree of exactness of proof required in the case of an alleged fraud. Moreover he did not state his reasons for concluding that the respondents misrepresented the weekly turnover of the business and that the weekly takings book did not give an accurate record of the weekly takings of the business.

Held:

By Mason CJ, Brennan, Deane & Gaudron JJ.

The trial Judge's judgment was not vitiated by the failure to make or to advert to the need to make any necessary finding in relation to the respondent's weekly takings book. Nor was his decision vitiated by any failure to disclose the reasoning behind his conclusion that the respondents were guilty of deceit.

By Toohey J.

The trial Judge did not direct his attention to the degree of proof required in this case and did

not adequately deal with the respondents' case. He should not have allowed the non-production of the weekly takings book to assume such an unwarranted significance. His Honour did not justify himself on his finding of deceit against the respondents.

[Appeal allowed with costs].

Cases referred to:
Hocking v. Bell [1945] 71 CLR 430 at p. 500 p. 464, p. 478 ***(refd)***
Rejfek v. McElroy [1965] 112 CLR 517, at pp. 519 - 521 ***(refd)***
Briginshaw v. Briginshaw [1938] 60 CLR 336 at p. 362 ***(refd)***
Helton v. Allen [1940] 63 CLR 691 at pp. 701, 711 ***(refd)***
Hocking v. Bell [1944] 44 SR (N.S.W.) 468 at p. 477 (affirmed in Hocking v. Bell [1945] 71 CLR at pp. 464, 500); p. 478 ***(refd)***
Wentworth v. Rogers (No. 5) [1986] 6 NSWLR 534 at p. 539 ***(refd)***
Jonesco v. Beard [1930] AC 298 at p. 300 ***(refd)***
Motchall v. Massoud [1926] VLR 273 at p. 276 ***(refd)***
Brott v. The Queen [1992] 173 CLR 426 ***(refd)***

Legislation referred to:
Criminal Code (W.A.) ss. 129, 470 & 473
Fair Trading Act 1987 (W.A.) s. 10
Trade Practices Act 1974, s. 52

For the appellant - M.A. McAuliffe & Associates
For the respondents - Godfrey Virtue & Co.

JUDGMENT

Mason CJ, Brennan, Deane & Gaudron JJ:

The background facts and the issues involved in this case are set out in the judgment of Toohey J.

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud (See, e.g., *Hocking v. Bell* [1945] 71 CLR 430 at p. 500; *Rejfek v. McElroy* [1965] 112 CLR 517, at pp. 519 - 521). On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear (*Briginshaw v. Briginshaw* [1938] 60 CLR 336 at p. 362; *Helton v. Allen* [1940] 63 CLR 691 at p. 701; *Hocking v. Bell* [1944] 44 SR (N.S.W.) 468 at p. 477 (affirmed in *Hocking v. Bell* [1945] 71 CLR at pp. 464, 500); *Rejfek v. McElroy* [1965] 112 CLR at p. 521; *Wentworth v. Rogers* (No. 5) [1986] 6 NSWLR 534 at p. 539 or cogent (*Rejfek v. McElroy* [1965] 112 CLR at p. 521 or strict *Jonesco v. Beard* [1930] AC 298 at p. 300; *Briginshaw v. Briginshaw* [1938] 60 CLR at p. 362; *Helton v. Allen* [1940] 63 CLR at p. 711; *Hocking v. Bell* [1944] 44 SR (N.S.W.) at p. 478 (affirmed in *Hocking v. Bell* [1945] 71 CLR at pp 464, 500); *Wentworth v. Rogers* (No. 5) [1986] 6 NSWLR at p. 538) proof is necessary "where so serious a matter as fraud is to be found" (*Rejfek v. McElroy* [1965] 112 CLR at p. 521). Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct (See, e.g. *Motchall v. Massoud* [1926] VLR 273 at p. 276 and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J. commented in *Briginshaw v. Briginshaw* ([1938] 60 CLR at p. 362; and see, also, *Helton v. Allen* [1940] 63 CLR at p. 711:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ... .

There are, however, circumstances in which generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading. In our view, it was so in the present case.

The central issue in the present case was whether the projected takings of the business which the respondent company ("Karajan") had sold to the appellant ("Neat Holdings") had been knowingly misrepresented by the second respondents ("the personal respondents") acting on behalf of Karajan. The represented takings corresponded with, or in the case of projected takings reflected, the figures in a weekly takings book which Karajan asserted had been contemporaneously and accurately

kept by the personal respondents. As the trial was conducted, it clearly became common ground that Karajan's claimed weekly takings of the business (before Neat Holdings took over) as recorded in that weekly takings book differed from Neat Holdings' claimed weekly takings (after it took over) as disclosed in Neat Holdings' weekly takings book to such an extent that they could not both be genuine. Each side claimed that the other side had falsified the figures recorded in the relevant takings book. As Seaman J. commented in the Full Court, the case of Neat Holdings was that the personal respondents "were hiding the true takings figures, and ... it was axiomatic that its case was that the weekly takings book was false". A corresponding attack was made by the respondents upon Neat Holdings' weekly takings book. Thus, under cross-examination, one of the personal respondents (Mr. Grant) gave evidence to the effect that, on the respondents' case, the figures in Neat Holdings' takings book could not "possibly be correct". He claimed that Mr. Gundill (a director of Neat Holdings) was telling "untruths about the count" and went on to advance the "proposition" that Neat Holdings had not "declared" all of the takings. Mr. Grant also repeated an allegation, which he had made in his evidence-in-chief, that he had seen Mr. Gundill with a bucket of $1 coins representing part of the takings of the first week after take-over which was of a value (approximately $4,500) that exceeded the total value ($3,300) of $1 coins shown in Neat Holdings' takings book for that week. In that context, as the learned trial Judge said, "the real issue in (the) case boil(ed) down to who is telling the truth about the turnover". In other words, the real issue in the case was not whether there had been deliberate falsification of the takings of the business. It was whether the deliberate falsification of takings figures had been on the part of the respondents or on the part of Neat Holdings. When an issue falls for determination on the balance of probabilities and the determination depends on a choice between competing and mutually inconsistent allegations of fraudulent conduct, generalisations about the need for clear and cogent proof are likely to be at best unhelpful and at worst misleading. If such generalisations were to affect the proof required of the party bearing the onus of proving the issue, the issue would be determined not on the balance of probabilities but by an unbalanced standard. The most that can validly be said in such a case is that the trial Judge should be conscious of the gravity of the allegations made on both sides when reaching his or her conclusion. Ultimately, however, it remains incumbent upon the trial Judge to determine the issue by reference to the balance of probabilities.

Examination of the trial Judge's judgment in the present case does not support the conclusion of the majority of the Full Court that his Honour fell into error in relation to the standard or degree of proof. The only express reference in the judgment to the standard of proof occurs in a reference to a submission made on behalf of the present respondents:

> It was submitted for the (respondents) that the Court has to be persuaded by (Neat Holdings) that on the balance of probabilities the turnover stated in the business profile was not received by (Karajan) ... I am persuaded to the required degree of that fact.

That passage indicates that his Honour dealt with the matter on the balance of probabilities. In that he was correct. The judgment contains no express reference to any requirement of clear, cogent or strict proof. However, in a context where the issue in the case had effectively resolved itself into which of Karajan (acting through the personal respondents) and Neat Holdings (acting through Mr. Gundill) had been guilty of deliberate falsification of its records of takings, the omission of any such reference neither involves nor indicates error on his Honour's part. To the contrary, in the particular circumstances of the present case and for the reasons which we have given, any such reference would have been unhelpful.

There remains for consideration the respondents' attack on the trial Judge's judgment on the ground that it failed adequately to deal with an important aspect of the case. His Honour found that Karajan's weekly takings book had not been produced to Neat Holdings or Mr. Gundill at any time before the sale. The figures in the book did, however, correspond with and support the representations about past weekly turnover or takings and the projections of future turnover which had been made. Realistically, a finding of fraudulent misrepresentation or deceit in relation to the past weekly turnover or takings of the business

could only have been made against the respondents if the learned trial Judge was satisfied, on the balance of probabilities, that the entries which the personal respondents had made in Karajan's weekly takings book had been deliberately falsified. It was submitted on behalf of the respondents that his Honour had failed to make, or to advert to the need to make, necessary findings in relation to the takings book or adequately to indicate the reasons for his decision that the respondents were guilty of the tort of deceit. In our view, there is no substance in that submission.

It is true that the trial Judge did not make an express finding that the entries in the book had been deliberately falsified by the personal respondents. Nonetheless, a careful reading of the whole of the judgment makes clear that his Honour was conscious of the fact that such a finding was implicit in the finding of deceit which he made against the respondents. As has been indicated, the central issue at the trial was whether Karajan's weekly takings figures (for the period prior to take-over) were false or whether Neat Holdings' weekly takings figures (for the period after take-over) were false. The respondents' approach on that central issue was that the takings figures in Karajan's takings book were genuine and accurate and that the figures in Neat Holdings' takings book were deliberately false in the sense that part of the takings had been concealed or not "declared". It was necessary for the purposes of Neat Holdings' case that it persuade the Court that the figures in Karajan's takings book were false. As a practical matter, that involved, in the circumstances, persuading the Court that the takings book had been deliberately falsified by the personal respondents. It did not, however, involve alleging or seeking to prove that the takings book was also a forgery in the sense that it was a subsequent fabrication of what purported to be a contemporaneous record of weekly takings (See the definition of a document "said to be false" in s. 470 of The Criminal Code (W.A.) as it stood prior to its repeal in 1990; and see, generally, *Brott v. The Queen* [1992] 173 CLR 426. Nor was it incumbent upon the learned trial Judge to make any positive finding in that regard.

In the course of his judgment, the trial Judge examined the evidence in considerable detail. Predictably, he found that it could not be said that the "dramatic" difference between the competing sets of takings figures "occurred because of bad management on the part of (Neat Holdings)" or could be "attributed to" changed economic conditions. As has been mentioned, he recognized that "the real issue" in the case boiled down to "who (was) telling the truth about the turnover", Mr. Gundill (i.e. Neat Holdings) or the two personal respondents (i.e. Karajan). His Honour proceeded to make express findings about Neat Holdings' weekly takings records. He found that Mr. Gundill kept those records "to the best of his ability". He accepted the evidence of Mr. Gundill that "he kept the figures in his books in a careful manner". He concluded that "those figures ... were accurate".

In contrast, the learned trial Judge rejected the evidence of the personal respondents. He found that "the business did not have the turnover which was stated in the business profile" which Karajan had given to Neat Holdings. That turnover corresponded with the figures in Karajan's weekly takings book. His Honour specifically found that that "weekly takings book ... did not accurately record the weekly takings of the business". Finally, he found that the personal respondents' misrepresentations about the weekly turnover figures "were not innocent but were made knowingly to induce (Neat Holdings) to purchase the business". Clearly, in the context of the competing allegations about deliberately false takings figures, his Honour would have been conscious of the fact that implicit in those findings was a finding that the entries in Karajan's weekly takings book which had been made by one or other of the personal respondents were false to the knowledge of the personal respondents at the time when they were made.

In these circumstances, the trial Judge's judgment was not vitiated by any failure to make, or to advert to the need to make, any necessary finding in relation to Karajan's weekly takings book. Nor was the judgment vitiated by any failure to disclose the reasoning which led his Honour to conclude that the respondents were guilty of the tort of deceit.

The appeal should be allowed with costs. The orders of the Full Court of the Supreme Court of Western Australia dealing with the appeal to that Court should be quashed and, in *lieu* thereof, it should be ordered that the appeal to that Court be dismissed with costs. The

appellant has not sought to challenge the order of the Full Court dismissing its cross-appeal to that Court. Accordingly, that order should stand. In a context where the respondents will be required to pay the appellant's costs of the appeal to the Full Court, however, there should be an order that the appellant pay the respondents' costs of that cross-appeal.

Toohey J:

The appellant obtained a judgment against the respondents after a hearing in the Supreme Court of Western Australia. On appeal to the Full Court, the judgment was set aside and a new trial was ordered. The appellant now seeks to reinstate the judgment obtained at first instance.

The appellant's claim against the respondents arose out of the purchase by the appellant from Karajan Holdings Pty. Ltd., the first respondent, of the "Starlight Express", a family amusement centre at Mandurah south of Perth. Negotiations on behalf of the appellant were conducted by its director, Mr. Gundill. The first respondent was represented by its directors, Mr. Grant and Mr. Unbehaun, the second respondents. During the negotiations for the sale of the business Mr. Grant and Mr. Unbehaun (and their selling agent Mr. Mahney, against whom the claim was dismissed) made representations to Mr. Gundill as to the turnover of the business. The representations included a document called a business profile which showed a turnover of $150,623 from 13 April 1990 until 12 October 1990, an average weekly turnover of $5,793.

The appellant took over the business on 29 December 1990. Mr. Gundill became concerned at the weekly takings which, apart from the first week, were of the order of $3,000 only. A few months later the appellant gave written notice of rescission of the contract for the purchase of the business on the ground of misrepresentation, then issued a writ and the action proceeded to trial. The statement of claim asserts various causes of action: deceit, negligent misstatement, breach of s. 52 of the Trade Practices Act 1974 (Cth) and breach of s. 10 of the Fair Trading Act 1987 (W.A.).

All causes of action other than deceit seem to have been largely put aside at trial and attention was focused on the appellant's claim in deceit. The appellant did not abandon its other causes of action but its Counsel invited the trial Judge to make a finding of deceit against the respondents, in which case it would be unnecessary to deal with the other causes of action. It does not appear how far his Honour was asked to consider the other causes of action if he should not be prepared to hold the respondents liable in deceit. In the event, the other causes of action were given no attention in the reasons of the trial Judge, except in relation to Mr. Mahney against whom, as I have said, the claim was dismissed. The trial Judge's finding that the respondents were liable in deceit gave rise on appeal to an issue as to the degree of proof required of the appellant to make good that cause of action; this in turn led to the judgment being set aside. It may be noted at this point that the only ground on which the respondents' appeal to the Full Court succeeded (ground 4) was formulated in these terms:

> The learned Trial Judge failed to direct himself and have regard to the degree of exactness of proof required where an allegation of fraud is made.

There was, however, a ground of appeal (ground 5) that the trial Judge

> failed to discharge his duty to adequately state the reasons for his conclusion that:
>
> (a) the (respondents) misrepresented the business insofar as the weekly turnover in the profile was concerned.
> (b) the Weekly Takings Book did not accurately record the weekly takings of the business.

Seaman and Murray JJ. rejected this ground. Nicholson J. did not refer to it in his reasons for judgment.

I return to the circumstances giving rise to the appellant's action against the respondents. The statement of claim pleads a number of misrepresentations on the part of the respondents. But in essence the complaint was that the respondents represented that the statement of past takings in the business profile was accurate when they knew that it was not. The respondents' answer was that the statement of past takings was accurate, that it was derived from a weekly takings book kept by them and that any fall in turnover after the appellant took over the business was due to a lack of business acumen and experience on the part of Mr. Gundill and to changes made by him in the

method of operating the business. Indeed, in cross-examination Mr. Grant went further and said that the figures given in evidence by Mr. Gundill of his takings could not possibly be correct.

Those aspects of the trial Judge's judgment that were canvassed before the Full Court and before this Court must be seen in the light of the way in which the parties conducted their cases at trial. It was not in issue that the respondents' representation as to the past takings of the business induced the appellant to buy the business. The appellant's argument that the representation was false to the knowledge of the respondents invited the trial Judge to reach that conclusion as an inference from the dramatic fall in turnover after the appellant took over the business and from the absence of anything that would explain the fall other than a false representation made knowingly. For their part, the respondents attacked the accuracy of the post-takeover figures provided by the appellant and offered explanations for the fall in turnover. But primarily their case was that the figures in the business profile had been taken from a weekly takings book which itself was an accurate contemporaneous record.

The trial Judge accepted the submission of Counsel for the appellant "that the real issue in this case boils down to who is telling the truth about the turnover, Mr. Gundill or the two second (respondents)". But in truth the case did not boil down to that. The appellant had to make good the proposition that the representation as to turnover was false. To the extent that the appellant relied upon its cause of action in deceit it had to go further and, in accordance with its pleading, show that the representation was false to the knowledge of the respondents or that it was made recklessly or without any reasonable basis for belief in its truth. This latter element was not crucial to the success of the appellant's claims under the Trade Practices Act or under the Fair Trading Act. The weekly takings book was put into evidence through Mr. Grant who, as Seaman J. pointed out in the Full Court, "was very closely cross-examined about the cash takings of the business and its records and in particular the lack of any record of the vital ingredient of the directors' drawings". The accuracy of the weekly takings book was in issue but it was not put to Mr. Grant that the second respondents had manufactured the book for the purposes of the action or for the purpose of selling the business or that they had falsified its contents.

The appellant was not shown the weekly takings book before agreeing to buy the business. The respondents contended that this was of no significance since the book showed only what appeared in the business profile, which was the document on which the appellant relied. However, in the course of his judgment the trial Judge referred many times and in different contexts to the fact that the appellant was not shown the weekly takings book before it agreed to buy the business. References of this type occur so often in the judgment that his Honour must be taken to have attached great significance to the non-production of the weekly takings book. Early in his judgment he referred to evidence by Mr. Gundill that, when he first discussed the income of the business with Mr. Grant and Mr. Unbehaun, he had compared the weekly turnover as shown in the business profile with the bank statements and records of wages. These, he said, had added up roughly to the weekly turnover. He was not entirely satisfied so he made a few calculations to confirm that the combination of bank deposits and wages payouts corresponded with the turnover figures shown in the business profile. His Honour then said:

> I note at this time that if he had been shown the weekly takings book then it is not likely that there would have been a need for this type of adding up and the resulting 'confusion'.

Later, his Honour made comments such as "(t)he point was as I find, that they had not supplied the weekly takings book to Mr. Gundill or Mr. Walters." Mr. Walters acted as an adviser to the appellant in the negotiations for the purchase of the business.

It is apparent from the reasons for judgment, read as a whole, that the failure of the respondents to show the weekly takings book to the appellant before the purchase of the business was critical to the decision reached by his Honour that the weekly takings of the business had been misrepresented and knowingly so. But, in approaching the matter in this way, his Honour did not really deal with the respondents' case. Had there been some difference between the figures appearing in the weekly takings book and those in the business profile, that would have been significant. Had the difference been that the

figures in the weekly takings book were lower than those in the business profile, that would virtually have concluded the case against the respondents. But that was not the situation; the figures were the same. In that event, to make a finding of deceit against the respondents, it would be necessary to conclude that the respondents deliberately exaggerated the figure in the weekly takings book each time they made an entry; alternatively that the weekly takings book was simply a concoction. Neither of these scenarios was put to the respondents in cross-examination.

Nicholson J., having referred to that part of the trial Judge's judgment in which he concluded that the turnover stated in the business profile had not been received by the respondents and that the representations made by them were untrue, to the knowledge of the second respondents, observed:

> For my part I am unable to find, in what precedes these conclusions of his Honour, findings which would support the conclusion that the projections of turnover were known by Messrs. Grant and Unbehaun to be incorrect and that the weekly takings book did not accurately record the weekly takings. Those are not inferences which I consider are open from the occasions of non-production of that book referred to in the reasons.

I agree with his Honour's observation.

The respondents' appeal to the Full Court was upheld by Seaman and Nicholson JJ., with Murray J. dissenting. The Majority were persuaded to allow the appeal because the trial Judge had neither turned his mind sufficiently to the seriousness of the conclusion he had reached, namely, that the respondents were guilty of deceit, nor to the steps to be taken in order to reach that conclusion.

Another feature of the trial was a submission, made on behalf of the respondents and referred to by the trial Judge in these terms:

> It was submitted for the first and second (respondents) that the Court has to be persuaded by the (appellant) that on the balance of probabilities the turnover stated in the business profile was not received by the first (respondent).

It was a curious submission for the respondents to make, not because the standard of proof was otherwise than on the balance of probabilities, but because of itself it did not invite his Honour to consider the degree of proof required where there was an allegation of fraud (See *Rejfek v. McElroy* [1965] 112 CLR 517 at p. 521.

In the course of his judgment, Seaman J. commented:

> His Honour was no doubt being as merciful as he could to the reputations of Mr. Grant and Mr. Unbehaun when making his findings of fact, but if the statement of weekly takings in the business profile was false to the knowledge of Mr. Grant and Mr. Unbehaun, then the weekly takings book was also false to their knowledge, and if the weekly takings book was false to their knowledge then it followed that they forged it because they were the only people who made entries in it.

Indeed, Seaman J. went on to say that the inevitable conclusion from the trial Judge's reasons was that he had found, to the civil standard of proof, that Mr. Grant and Mr. Unbehaun had forged and uttered the weekly takings book contrary to s. 473 of The Criminal Code (W.A.) ("the Code") and had fabricated evidence contrary to s. 129 of the Code by relying upon it in evidence at the trial.

It may be going too far to say that the inevitable conclusion from the trial Judge's reasons was that the second respondents' conduct was contrary to provisions of the Code. Assuming that the weekly takings book was a contemporaneous record (and no one suggested that it was not), the entry of figures that were inaccurate would not amount to forgery nor would it constitute the fabricating of evidence. Certainly, if the book had been brought into existence shortly before trial for the purpose of its production in evidence, it is likely that the author committed the offences of forgery (As to the elements of forgery at common law, see *Brott v. The Queen* [1992] 173 CLR 426) and of fabricating evidence. But, as has been said already, no-one suggested that as a possibility. In deciding that there should be a retrial, Seaman J. said:

> The finding against Mr. Unbehaun and Mr. Grant is of such gravity that I am of opinion that there was a substantial wrong or miscarriage because the authorities to which I have referred were not expressly addressed and applied to the facts of the case. It seems to me that in the particular circumstances of this case Mr. Grant and Mr. Unbehaun were entitled to a detailed analysis of the evidence surrounding the weekly takings book and a clear application of the

principles emerging from the authorities to which I have referred and in particular an express consideration of the presumption that they were innocent of forging and uttering the weekly takings book before his Honour made a finding that is only explicable on the basis that they had done so.

For reasons already given, that puts the matter too strongly. Nevertheless, I am of the opinion that the majority were correct in concluding that the judgment against the respondents could not stand. The criticism to be made of the trial Judge's reasons is not only that he did not direct his attention to the degree of proof required in the particular case but also that he did not adequately deal with the respondents' case. His Honour allowed the non-production of the weekly takings book to the appellant before the sale of the business to assume a quite unwarranted significance in the conclusions he reached. Its non-production seems to have diverted his Honour's attention from what was necessary to justify a finding of deceit against the respondents, in particular the need to deal with the respondents' evidence concerning the weekly takings book. While the failure of a trial Judge to deal with a particular aspect does not of itself warrant the conclusion by an appellate Court that the trial Judge has overlooked that consideration, the dominant role which non-production of the weekly takings book played in his Honour's mind and the absence of any real analysis of the evidence relating to the weekly takings book lead inevitably to the conclusion that his Honour did not adequately deal with the respondents' case in answer to the action based on deceit. These considerations may seem to range more widely than ground 4 of the notice of appeal to the Full Court would suggest but the appeal to this Court was conducted by reference to them.

For these reasons, while not endorsing entirely the approach taken by the majority in the Full Court, I am of the opinion that their decision to set aside the judgment was correct and that the only proper course was that there be a retrial. I would dismiss the appeal.